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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 292

PETER DURYEE, Trustee of the Property of The New Jersey and New York Railroad Company,

Petitioner,

vs.

ERIE RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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August 25, 1949.

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vs.

ERIE RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Peter Duryee, Trustee of the Property of The New Jersey and New York Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 1, 1949, affirming a judgment of the District Court of the United States for the Northern District of Ohio, Eastern Division, granting summary judgment against petitioner (R. 314-315).*

* References noted as such are to the transcript of record. References (fol. —) are to the transcript of record by folio number. References to pages of the Erie Reorganization Record are referred to as (E—).

Opinions Below

The opinion of the Court of Appeals (R. 334-345) is not yet reported. The opinion of the District Court (Wilkin, J.) (R. 304-312) is reported in 76 F. Supp. 635.

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, sections 1254(1) and 2101(c).

Questions Presented

The ultimate question is whether the Court of Appeals erred in affirming summary judgment against the trustee of a short-line subsidiary railroad in reorganization under Section 77 of the Bankruptcy Act in an action brought by him against the parent railroad for an adjudication that, under the doctrine of *Consolidated Rock Co.* v. *DuBois,* 312 U. S. 510, 523-524, and other decisions, the parent is liable for certain obligations and debts of the subsidiary by virtue of the parent's long-continued domination, control, management and unified operation of the subsidiary as a mere department, adjunct and instrumentality of the parent.

The specific questions will be enumerated after the following brief summary of the factual background.

In January 1938 the parent railroad petitioned a federal district court in Ohio for reorganization under Section 77 of the Bankruptcy Act. Six months later the subsidiary petitioned the same court for reorganization as a part of the parent's reorganization. The two trustees of the parent, one of whom was its president, were appointed the trustees

of the subsidiary. Under orders of the court, the time for filing claims against the parent expired on a date in 1938 which was several days prior to the earliest date for filing claims against the subsidiary. No claims against the parent were filed by the trustees or by the bondholders or other creditors of the subsidiary.

A plan of reorganization of the parent was confirmed by the court in Ohio in June 1941. The plan contained no provision as to the subsidiary or its creditors. On petition of the trustees, the court ordered on December 9, 1941, that the property and rights of the subsidiary be vested as of January 1, 1942 in petitioner as trustee appointed by the federal district court in New Jersey, in which court another Section 77 proceeding for reorganization of the subsidiary had been brought and has continued. On December 20, 1941, a bar order was entered in the court in Ohio discharging the parent, as of December 22, 1941, from all except certain of its debts, obligations and liabilities. Those excepted did not specifically include any owing to the subsidiary or its creditors. The bar order reserved in the district court in Ohio, and that court has retained, jurisdiction for all purposes necessary to carry out the bar order and the plan of the parent, including the purpose of "passing upon claims of creditors of, or claims against", the parent. No plan of reorganization of the subsidiary has been filed either in the proceeding in New Jersey or in that in Ohio.

In 1947, after officers of the parent had been examined in hearings under Section 21(a) of the Bankruptcy Act in the proceeding in New Jersey, petitioner, pursuant to authority granted by the district court in New Jersey, instituted the present action in the district court in Ohio for an adjudication that the parent is liable for tax claims, bonded indebtedness and tort obligations totalling $1,434,428.01 (plus interest) incurred by the subsidiary prior to its petition for reorganization.

The complaint alleged that from 1897 until the date of the parent's petition, the parent had continuously and completely dominated, controlled, managed and unifiedly operated the subsidiary as a mere department, adjunct and instrumentality of the parent. The answer denied these allegations, but admitted other of the complaint's averments, including that the parent had continuously owned more than 80% of the outstanding voting stock of the subsidiary. By way of affirmative defense, the answer pleaded that the action was barred by the bar order and other proceedings in the reorganization of the parent. This defense being deemed denied or avoided (Federal Rules of Civil Procedure, Rule 8(d)), petitioner served no reply.

On the parent's motion for summary judgment based mainly on its alleged affirmative defense, affidavits annexing various exhibits were filed by it in support of the motion, and by petitioner in opposition thereto. Those filed by petitioner, while not contesting the existence of the plan or bar order relied on by the parent and while not expressly avering fraud by way of avoidance, supplemented the circumstances hereinbefore summarized which appeared from documents filed in the action and which were contended by petitioner as showing a sufficiently strong possibility or probability of fraud or breach of trust to call for full trial. Such trial was requested by petitioner on other grounds as well.

The district court granted summary judgment for the parent on the ground that the action was barred by Section 77(f) of the Bankruptcy Act and by the bar order. It held, however, that petitioner's claim could be asserted as a defense or set-off to a counterclaim which the parent had filed. The parent thereupon dismissed its counterclaim.

The specific questions presented by the Court of Appeals' affirmance of summary judgment are:

1. Whether, considering the disputed issues of fact and the complexity of the case, summary disposition was permissible under Rule 56 of the Federal Rules of Civil Procedure.

2. Whether the Court of Appeals committed reversible error in holding, and to some extent basing its affirmance of summary judgment on the ground, that the complaint failed to state a claim because it did not allege fraud, spoliation, waste or unfair management to the advantage of the parent and to the detriment of the subsidiary.

3. Whether, in the circumstances, the bar order was applicable to petitioner's claim.

4. Whether the bar order, if it was applicable to petitioner's claim, constituted a complete defense available to the parent.

5. Whether the action was barred by Section 77(f) of the Bankruptcy Act.

Statute and Rules Involved

The pertinent provisions of Section 77 of the Bankruptcy Act (47 Stat. 1474, 11 U. S. C., § 205), as amended, are set forth in Appendix "A", *infra*, pages 22-24.

The pertinent provisions of Rule 56, and Rules 7a and 8d, of the Federal Rules of Civil Procedure are set forth in Appendix "B", *infra*, pages 24-26.

Statement

Petitioner is the Trustee of the Property of The New Jersey and New York Railroad Company (hereinafter called "The New Jersey") in reorganization under Sec-

tion 77 of the Bankruptcy Act in the United States District Court for the District of New Jersey. On April 2, 1947, pursuant to that court's authorization (R. 11-13), he instituted the present action against respondent, Erie Railroad Company (hereinafter called "Erie"), in the United States District Court for the Northern District of Ohio, Eastern Division (hereinafter called "the district court" or "the district court in Ohio"). The New Jersey is a subsidiary of Erie, and the action was brought for the benefit of mortgage bondholders and other creditors of The New Jersey. The States of New Jersey and New York on account of unpaid taxes and various persons to whom The New Jersey is indebted on account of personal injuries and deaths are included among such creditors (R. 7-10).

The prayer of the complaint was that, (a) the court find and order that specified obligations and debts of The New Jersey owing to said creditors as of June 30, 1938, the date of The New Jersey's petition for reorganization, and totalling $1,434,428.01, together with accrued and penalty interest, are obligations and debts of Erie and are due and payable; and (b) the court render judgment against Erie for the total amount thereof, including accrued and penalty interest; and (c) the court grant such other relief as might be just and equitable, together with costs and disbursements (R. 2-10).

The complaint alleged, *inter alia*, that: The New Jersey was organized in 1885 under the laws of New Jersey; Erie is a corporation organized under the laws of New York and having its principal operating office and place of business in Cleveland, Ohio; on June 30, 1938, a voluntary petition for reorganization, under Section 77, was filed in the district court in Ohio by The New Jersey as a subsidiary debtor of Erie; since January 18, 1938, Erie has been in reorganization under Section 77 in the same court; during the period of reorganization of The New Jersey in the district court in Ohio, the trustees of

The New Jersey were the same individuals who were trustees of Erie; and the reorganization proceedings of The New Jersey in the district court in Ohio were transferred to the district court in New Jersey on January 1, 1942, on which date petitioner became Trustee of the property of The New Jersey (R. 2-4).

The complaint further alleged that: from 1897, continuing to the date of the complaint, Erie owned and controlled more than 80% of the outstanding voting capital stock of The New Jersey; from 1897 until June 30, 1938, The New Jersey was continuously and completely dominated, controlled, managed and unifiedly operated by Erie as a mere department, adjunct and instrumentality of Erie; throughout said period, Erie caused the physical operations and administrative organization of The New Jersey to be carried on as a mere department, adjunct and instrumentality of Erie; during the period through June 30, 1938, The New Jersey incurred the obligations and debts set forth in the complaint, for which judgment was prayed; The New Jersey was and is unable to satisfy any such obligations or debts or the accrued or penalty interest thereon, although due demand has been made therefor; and prior to commencing the action, petitioner as trustee duly demanded that Erie pay over to him the amount of the obligations and debts with interest, but Erie failed and refused to do so (R. 2-10).

The complaint alleged that Erie's domination, control, management and unified operation of The New Jersey as a mere department, adjunct and instrumentality of Erie was accomplished by the following, among other, means: Erie, by virtue of its stock ownership and control, elected all of the members of the board of directors of The New Jersey, of whom a substantial majority were either directors, officers or key personnel of Erie; the directors of The New Jersey, so elected and composed, were under the complete control of Erie or its board of directors or officers,

and they elected or appointed an executive committee and officers and key personnel for the operation of The New Jersey who were all directors, officers or key employees of Erie and whose primary duties were owed to Erie rather than to The New Jersey; the directors or officers of The New Jersey caused to be effected and amended from time to time an operating contract or arrangement between Erie and The New Jersey, under which, equipment of Erie was leased to The New Jersey and under which the officers and key personnel of Erie were required to operate The New Jersey, the charges for such leasing and services being apportioned on a formula embracing Erie and its subsidiaries collectively known as the Erie Railroad System; from time to time the directors or officers of The New Jersey also caused to be executed collective bargaining contracts with its operating employees, which contracts provided, in substance, that such employees were joint employees of Erie and The New Jersey and had important rights on other railroads of Erie's system; the directors or officers of The New Jersey caused its principal operating office to be moved from New York, N. Y., to Cleveland, Ohio, when or about when Erie's principal operating office was moved from New York to Cleveland, and caused all necessary papers and documents to be executed on behalf of The New Jersey by individuals whose primary duties were owed to Erie rather than to The New Jersey; from time to time, Erie paid interest on the bonds of The New Jersey and paid the railroad taxes paid to the State of New Jersey; and Erie openly represented to the public that The New Jersey was part of the Erie Railroad System (R. 4-6).

Erie's answer to the complaint admitted certain of the allegations thereof including those as to the reorganization proceedings, the identity of the trustees of Erie and The New Jersey prior to the transfer of the reorganization of The New Jersey from the district court in Ohio to the district court in New Jersey, and Erie's ownership and control of more than 80% of the stock of The New Jersey.

The answer denied the allegations as to Erie's domination, control, management and unified operation of The New Jersey as a department, adjunct and instrumentality of Erie. In addition, the answer alleged matters by way of affirmative defense, and contained a counterclaim (R. 14-20).

For affirmative defense, the answer alleged, *inter alia*, that: by order entered May 7, 1938, in the Erie reorganization proceedings, the district court in Ohio fixed October 1, 1938, as the time within which claims of Erie's creditors had to be filed or evidenced if they were to participate (R. 16-17); neither petitioner nor his predecessor trustees filed or evidenced any claim against Erie therein (R. 17); the district court in Ohio approved the Plan of Reorganization of Erie by order entered December 30, 1940, confirmed the Plan by order entered June 16, 1941, and by Order No. 386 (hereinafter called the "bar order") entered December 20, 1941, provided for the vesting of the estate of Erie Railroad Company, Debtor, and all right, title and interest of the trustees therein, in reorganized Erie as of December 22, 1941 (R. 16); petitioner's alleged cause of action was barred by said bar order and was barred also by laches (fols. 50, 46); and his only remedy, if any, was to file a petition in the Erie reorganization proceeding for leave to file a claim therein, the district court in Ohio "having reserved and still retaining jurisdiction over claims, pursuant to said Order No. 386" (fol. 50). Copies of the bar order (R. 75-133) and order approving (R. 21-60) and order confirming (R. 61-74) the Plan of Erie were annexed to the answer.

Erie's counterclaim was for alleged debts of The New Jersey or its trustees aggregating $6,803,922.35 to April 30, 1947, plus interest, allegedly based on cash advances, freight interchanged, *per diem* and rent of passenger cars, loss and damage claims, interline ticket balance, and "miscellaneous contract and other charges" (this item totaling

$4,201,418.39). These alleged debts for the period prior to June 30, 1938, aggregated $5,803,983.62 plus interest (R. 19-20).

Petitioner served no reply to the counterclaim, but made a motion, supported by affidavit and exhibits, to dismiss the counterclaim on the ground, in substance, that the district court in New Jersey had exclusive jurisdiction to entertain claims against petitioner as trustee (R. 134). While this motion was pending, Erie made a motion, (1) to dismiss the complaint for alleged failure to state a claim upon which relief could be granted, or in the alternative, (2) to enter summary judgment for Erie on the ground that the action was barred by the Erie reorganization proceeding in the same court (*i. e.*, the district court in Ohio), or in the alternative, (3) that the court ascertain what material facts existed without substantial controversy and what material facts are controverted, and make an order specifying the facts in the first category and directing such further proceedings as are just (R. 224).

Two affidavits incorporating exhibits were submitted by Erie in support of its motion, and two others incorporating other exhibits were submitted by petitioner in opposition to the motion (R. 225-303). Those submitted by Erie pertained mainly to the matters of the affirmative defense alleged in its answer (R. 225-303). Those submitted by petitioner did not dispute that the bar order and other orders invoked by Erie had been issued in the Erie reorganization proceeding, and did not specifically aver fraud with respect to such orders; but included, *inter alia*, a certified copy of the Report of Special Master dated January 23, 1946, made in the New Jersey proceeding after hearings pursuant to Section 21(a) of the Bankruptcy Act at which officers of Erie were examined, and a certified copy of the New Jersey district court's order confirming the Report (R. 263-264, 174-223). The Report contained the following, among other findings:

"Since 1922 Erie has owned 83.6% of the Debtor's (*i. e.*, The New Jersey's) stock. It was testified that there was no question but that Erie elected the directors of the Debtor and ran its business prior to the bankruptcy. The Debtor was a subsidiary of and was solely and directly controlled by Erie. * * * at all times prior to 1938 a majority of the directors of the Debtor were directors, officers or employees of the Erie. Erie's officers above the grade of superintendent, were the same individuals as were the Debtor's officers. When the general offices of Erie were removed to Cleveland, Ohio, the general offices of the Debtor were likewise removed to Cleveland, Ohio, even though the Debtor operated no railroad in Ohio" (R. 212-213).*

The facts principally relied on by petitioner in opposing Erie's motion for summary judgment appeared from the record of the Erie reorganization proceedings, which record, pursuant to stipulation, was incorporated in the record herein.

On the basis of whole record, petitioner contended that the circumstances as to the conduct of those proceedings, presented, in the aggregate, a strong possibility or probability of fraud and breach of trust on the part of Erie and its trustees with respect to The New Jersey and its creditors and with respect to the bar order; that such fraud or breach of trust, if proved, would vitiate Erie's alleged affirmative defense; and that, since Erie disputed the occurrence of any such fraud or breach of trust, genuine issues of fact precluding summary disposition were presented on

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* In a railway mail proceeding, the Interstate Commerce Commission had decided in *1934* that The New Jersey was not a separately operated railroad. *Matter of Application of The New Jersey and New York Railroad Company For Classification As a Separately Operated Railroad,* 198 I. C. C. 504. The Commission found that The New Jersey's "physical operations and its administrative organizations are not separate and distinct from those of the Erie and its subsidiary lines."

Erie's motion, even apart from the factual issues raised by the pleadings. The suspicious coincidences particularly emphasized by petitioner were, among others, that: The New Jersey, after petitioning for reorganization as a part of the Erie's reorganization, was excluded from the Erie plan;* the two trustees of Erie, one of whom was Erie's president, were also the trustees of The New Jersey during the reorganization in Ohio (E. 735-739); under court order obtained by the Erie Trustees, the time for filing claims against Erie expired October 1, 1938, which was several days prior to the earliest date for filing claims against The New Jersey, such date having been set by court order obtained by such same individuals as trustees of The New Jersey (R. 306); such individuals as Trustees of The New Jersey petitioned for and obtained, on December 9, 1941, an order for the dismissal of the reorganization proceedings of The New Jersey in Ohio (E. 4213-4218, 4265-4267) without even token compliance with Section 77 (g) of the Bankruptcy Act, *i. e.*, requirement for full hearing and consideration of the recommendation of the Interstate Commerce Commission; and following this court order of December 9, 1941 such same individuals knowing that the property and rights of The New Jersey would be vested in petitioner under said order as of January 1, 1942, caused a petition for the bar order to be filed with the court on December 12, 1941. Such bar order be-

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* The Director of the Bureau of Finance of the Interstate Commerce Commission, in a letter dated December 23, 1947, responding to an inquiry of counsel, stated that he could recall only one other instance where a subsidiary debtor, once having filed its petition for reorganization as a subsidiary debtor, was not so reorganized in connection with or as a part of the reorganization of the parent company (R. 270-272). In that instance, however, oil was discovered adjacent to the subsidiary's right-of-way during the pendency of the proceeding, and the subsidiary received substantial returns from settlements with oil companies and, on its own request for dismissal of the reorganization proceedings as to it, took back its property (*id.*).

came effective ten days later (*i. e.*, December 22, 1941, prior to the vesting of The New Jersey's property and rights in petitioner) (E. 4807-4873).

Erie's motion for summary judgment and petitioner's motion to dismiss Erie's counterclaim were heard and determined in conjunction with a motion of Erie, similar to its motion herein, made by it in an action like the instant brought against Erie by Waldo H. Beckley, a first mortgage bondholder of The New Jersey; and in conjunction also with a petition filed in the Erie reorganization proceeding by Charles Massie, another bondholder, for an order declaring that the bar order did not preclude him from bringing an action to enforce rights claimed by The New Jersey bondholder, or for an order opening and modifying the bar order to permit such an action (R. 304-305).

The opinion of the district court (Wilkin, J.) in all three cases was rendered March 15, 1948 (R. 304-312). It sustained Erie's motion against Beckley (R. 305); denied Massie's petition (R. 309); and stated as to the present case that "the court overrules grounds 1 (*i. e.*, motion to dismiss complaint as not stating a cause of action under Rule 12b) and 2 (*i. e.*, motion for summary judgment under Rule 56) of the motion for dismissal and summary judgment, and sustains part 3 of the motion" (fol. 927), and that petitioner's motion for dismissal of the counterclaim "will be overruled" (fol. 933). The court held that petitioner, unlike the bondholders, was not chargeable with laches (fols. 934-941), that petitioner's claim had never been adjudicated (fol. 935), and that the claim alleged in his complaint could be asserted as a defense and set-off to Erie's claim against The New Jersey (fols. 934-936, 942). It held, nevertheless, that petitioner's claim could not be asserted generally (*i. e.*, as a plenary action) or as a reason for reopening Erie's Plan of Reorganization (fols. 936, 941-942). The opinion did not set forth an explicit ground for this conclusion, but the district court's

judgment specified as the reason that "such action is barred by Section 77(f) of the Bankruptcy Act and by Order No. 386" (*i. e.*, the bar order) (fol. 942).

The district court's judgment (R. 314-315) was entered June 9, 1938. Differing from the opinion, and after Erie's voluntary dismissal of its counterclaim, it granted the motion for summary judgment. The judgment specified that it was without costs and without prejudice to the rights of petitioner "in any other proceeding or action, to assert the claim pleaded in the complaint herein solely as a defense and set-off against the claim or claims of Erie, herein pleaded" (fol. 944).

The judgment of the district court neither denied nor granted petitioner's motion for dismissal of the counterclaim, Erie having filed a voluntary dismissal of its counterclaim in the interim subsequent to the court's opinion and prior to judgment (R. 312).

Petitioner appealed to the Court of Appeals for the Sixth Circuit from the portions of the judgment which held that petitioner's claim was barred by Section 77(f) and by the bar order, and which granted Erie's motion for summary judgment, and from related portions (R. 316). Erie cross-appealed from the portions which held that petitioner could not be charged with laches and that his claims had never been adjudicated, and could be asserted as a defense and set-off (R. 317). No appeal was taken by Erie on lower court's refusal to dismiss complaint as not stating a cause of action (*supra*, p. 13).

On June 1, 1949, the Court of Appeals rendered its opinion and judgment affirming the judgment of the district court (R. 333-345).*

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* On the same date the Court of Appeals affirmed the summary judgment against Beckley. It did so *per curiam* on the authority of its decision herein. There was no appeal by Massie.

Reasons for Granting the Writ

1. In affirming summary disposition of this involved case affecting the rights of various creditors, the Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court construing Rule 56 of the Federal Rules of Civil Procedure, and has so far sanctioned a lower court's departure from the accepted and usual course of judicial proceedings as to call for review. Cf. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 621, 627; *Arenas* v. *United States*, 322 U. S. 419, 431, 434; *Fountain* v. *Filson*, 336 U. S. 681.

The impropriety of summary judgment in cases where, as here, the circumstances and issues are complex and the whole truth is not clear from the papers filed, is particularly evident from this Court's decision and opinion in the *Arenas* case. On certiorari therein the Court, upon the following grounds stated in its opinion, reversed the affirmance of a summary judgment which, based on prior litigation, had been granted for the defendant:

> "The outlines of the controversy are clear, but the summary disposition of the case had precluded the adversary trial which alone would give reliable foundation for determining it * * *" (322 U. S. at 431).
>
> "* * * the duty of the Court under the jurisdictional act can be discharged in a case of this complexity only by trial, findings and judgment in regular course" (322 U. S. at 434).

The same grounds for reversal exist here. A decision to that effect by this Court would be of twofold importance. It would further clarify the proper scope of Rule 56 for the guidance of the federal courts, and it would safeguard the rights of the considerable number of creditors in whose behalf petitioner brought this action and seeks a full trial.

Even apart from the degree of complexity of a particular case, summary judgment is authorized under Rule 56 "only if there is no dispute as to any material fact". *Fountain* v. *Filson, supra,* at 683; *Sartor* v. *Arkansas Natural Gas Corp., supra,* 627; *Associated Press* v. *United States,* 326 U. S. 1, 6. Since in the present case Erie's answer to the complaint denied petitioner's allegations as to Erie's continuous domination, control, management and unified operation of The New Jersey as a mere department of Erie, and as to specified means by which such were accomplished (R. 14-15, 4-7), and since those allegations of fact were material to, indeed were the heart of, petitioner's claim (see *infra,* p. 18), the pleadings clearly presented a dispute as to material fact. No finding or statement to the contrary appears either in the opinion of the district court granting summary judgment or in that of the Court of Appeals affirming. Nor does either opinion even refer to Rule 56 or its requirements, although the point was presented and fully briefed by petitioner in both courts below.

The matters alleged as affirmative defense in Erie's answer were not, and ought not to be, held to have rendered the aforesaid factual dispute immaterial or spurious for purposes of Rule 56. Indeed, Erie's affirmative allegations interjected some additional factual dispute. Under Rule 8(d) they were and are to be deemed denied or avoided. In both courts below, moreover, petitioner contended that they gave rise to particular questions as to whether the bar order and the other orders invoked by Erie were obtained as part of a scheme of fraud and breach of trust of Erie or its trustees, and that these questions could be determined reliably only by full trial. The bona fides of these questions is apparent from the circumstances hereinbefore summarized (pp. 6-8, 10-12) disclosed by the record herein. Their materiality has not been denied by Erie or either of the courts below, nor could it be validly, since any such fraud or breach of trust

should be ground for reopening the bar order and other orders and should vitiate them as a defense available to Erie. *Cf. Northern Pacific Ry.* v. *Boyd,* 228 U. S. 482; *Wayne Gas Co.* v. *Owens Co.,* 300 U. S. 131, 135-137; *Pepper* v. *Litton,* 308 U. S. 295, 304-305 and cases cited n. 11; *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238; *Mohonk Realty Corporation* v. *Wise Shoe Stores,* 2 Cir., 111 F. (2d) 287, cert. den. 311 U. S. 654.

2. If the decision of the Court of Appeals were construed as a holding that summary judgment was justified because the affidavits and exhibits relied on by petitioner in opposing the motion did not contain definite proof of fraud on the part of Erie or its trustees in obtaining the bar order or the other orders invoked as affirmative defense, it would conflict in principle with decisions of the Court of Appeals for the Second Circuit in *Arnstein* v. *Porter,* 154 F. (2d) 464; *Bozant* v. *Bank of New York,* 156 F. (2d) 787 and *Fogelson* v. *American Woolen Co.,* 170 F. (2d) 660, 662. See also *Doehler Metal Furniture Co.* v. *United States,* 2 Cir., 149 F. (2d) 130, 137; *Peckham* v. *Ronrico Corporation,* 1 Cir., 171 F. (2d) 653, 657.

Those decisions stand for the proposition that, at least as to matters peculiarly within the defendant's knowledge, where the plaintiff's proof "must be drawn largely from" him (*Fogelson* case, *supra,* at 662), and where credibility is involved, the plaintiff, in opposing summary judgment under Rule 56, need not submit affidavits or other evidence directly refuting or avoiding the showing made by defendant, but need only show that there is "the slightest doubt as to the facts." *Doehler* case, *supra,* at 135; *Peckham* case, *supra,* at 657. The suspicious circumstances hereinbefore summarized (pp. 6-8, 10-12) meet that test amply in the present case.

The question as to the validity of such test is of importance in the application of Rule 56 and is one not

hitherto determined by this Court and likely to recur frequently in the lower federal courts until so determined.* Review, therefore, would be warranted apart from any conflict of decisions.

3. The opinion of the Court of Appeals in the present case discloses that the court held, or, in any event, considered that, under the authority of *Comstock* v. *Group of Investors*, 335 U. S. 211, the complaint failed to state a claim, in that it did not allege fraud, constructive fraud, spoliation, waste or unfair management on the part of Erie to the benefit of Erie and the detriment of The New Jersey (R. 341, 343, 344). The court stated that "the rule laid down in the *Consolidated Rock Products* case (312 U. S. 510), is not here applicable, under the authority of *Comstock*" (R. 341). This apparent holding was made by the Circuit Court, notwithstanding the decision by the lower court upholding the sufficiency of the complaint (fol. 927) and the further fact that Erie did not appeal from such lower court decision (R. 317; *supra*, p. 14).

The opinion further indicates that this misapprehension of the *Comstock* decision contributed to the court's affirmance of summary judgment and, therefore, should not be regarded as harmless (R. 341, 343, 344). Passages of the opinion indicate that, if the court had deemed the complaint to state a claim under the *Consolidated Rock* case, the court might conceivably have upheld petitioner's contention that it would be inequitable and in contravention of public policy to hold the action barred without

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* The majority opinions in the *Arnstein* and *Doehler* cases, *supra*, were written by Judge Frank. His dissenting opinions in other cases wherein a different bench upheld summary judgment, and the dissenting opinion of Judge Clark in the *Arnstein* case, indicate a contrariety of view on the present point among the judges of the Court of Appeals for the Second Circuit. See *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 2 Cir., 147 F. 2d 399, cert. den. 325 U. S. 861.

affording petitioner a trial at which he would have an opportunity to prove fraud in avoidance of, or as a basis for reopening, the bar order (*id*).

In the *Consolidated Rock* case, which involved a Section 77B proceeding, this Court held that the bondholders of subsidiaries which had been operated as mere departments of the parent, could, for that reason, reach the assets of the parent. The Court said (at 524):

> "* * * It is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management. *Davis* v. *Alexander,* 269 U. S. 114, 117; * * * (citing other decisions)."*

The *Comstock* case did not involve any question of liability of a parent for debts of a subsidiary. It involved the converse, namely, the claim of a parent against its subsidiary under the so-called Deep Rock doctrine. The majority opinion in the *Comstock* case nowhere refers to the *Consolidated Rock* case and, in petitioner's view, is not to be understood as having modified that decision in any respect. Since, however, the Court of Appeals took a different view, the instant case presents an appropriate occasion for clarification of the *Consolidated Rock* doctrine as affected, if at all, by *Comstock*. An additional reason for certiorari is that the opinion in *Consolidated Rock* noted that the Court was not there dealing with "a situation where other creditors of a parent company are competing with creditors of its subsidiaries" (312 U. S. at 524). The question as to the applicability of the doctrine in such a situation thus was reserved.

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*See also: Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L. J. 193 (1929); *Stone* v. *Eacho,* 4 Cir., 127 F. (2d) 284.

4 and 5. In interpreting the bar order and Section 77(f) as applying to and precluding the claims asserted by petitioner, the Court of Appeals has decided a question which is of importance in the administration of the railroad reorganization provisions of the Bankruptcy Act and which has not yet been passed upon by this Court. So far as has been discovered, this Court has not had previous occasion to construe Section 77(f). Its importance in the scheme of the Act is obvious, since it sets forth the culminating steps in the process of railroad reorganization and prescribes their effect.

The question of interpretation involves a reconciliation of two competing policies. One is that when a plan of reorganization is confirmed and the debtor's property is transferred or retained pursuant thereto, the debtor ordinarily should be regarded as discharged finally from all preexisting debts and liabilities not specifically excepted in the court's orders. The other is that the bankruptcy and other courts should be ever vigilant to prevent breach of fiduciary duty, fraud, or injustice. The Court of Appeals emphasized the first of these (R. 343). Petitioner contends that, in the circumstances, greater weight should have been accorded the second. Cf. *Pepper* v. *Litton*, 308 U. S. 295; *St. Louis & S. F. R. R.* v. *Spiller*, 274 U. S. 304, 314-316; *Northern Pac. Ry. Co.* v. *Boyd*, 228 U. S. 482.

In the *Pepper* case this Court noted that "even though the (bankruptcy) act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the bankruptcy court in the exercise of its equitable jurisdiction has power to permit claims to be proved thereafter in order to prevent a fraud or an injustice (citing cases)" (308 U. S. at 305). In the *Spiller* case the Court held that a creditor's "serious inadvertence" in failing to file his claim in a receivership suit within the time specified in an order of the court, and his failure thereby to conform with the terms of the

reorganization plan, would not, where he had not been guilty of laches, preclude him from being put, as nearly as possible consistently with the rights of others, into the position he would have occupied had he filed his claim in time. Since in the present case the district court held that petitioner could not be charged with laches (R. 310, 314) and this holding was undisturbed by the Court of Appeals, and since the relief asked by petitioner would not, so far as appears from the record, involved any inequity to others having equal or superior claims, the principles of these decisions should be applied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Peter Duryee, Trustee of the Property of The New Jersey and New York Railroad Company, Petitioner.

August 25, 1949.

Appendix "A".

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U. S. C. § 205) are as follows:

(c) After approving the petition:

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"(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization."

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"(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the

debtor may have a cause of action arising therefrom against any person or corporation."

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"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other

proper and necessary parties, to make any such transfer or conveyance and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case." • • •

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Appendix "B".

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are as follows:
"Rule 56. SUMMARY JUDGMENT.

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action, or after service of a motion for summary judgment, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

(d) **Case Not Fully Adjudicated On Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** * * *"

Rule 7(a) of the Federal Rules of Civil Procedure provides:

> (a) **Pleadings.** There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Rule 8(d) of the Federal Rules of Civil Procedure provides:

> (d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.